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Mr Messrs Douglas & Co
Bankers in the

February 5. 1771

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Refuse

Unto the RIGHT HONOURABLE,
The LORDS OF COUNCIL AND SESSION,

T H E
P E T I T I O N
O F

Messrs DOUGLAS, HERON, and Company, Bankers in Air,

Humbly sheweth,

THAT, upon the 30th of March, 5th, 7th, and 11th of April 1769, an obligation (the purport whereof shall immediately be explained), was granted to the Governor and Company of the Bank of Scotland, by Patrick Earl of Dumfries, George Young of Coupergrange, William M'Ghie of Ballmaghie, Alexander Gordon of Greenlaw, Ebenezer M'Culloh merchant in Edinburgh, and George Young, junior, merchant there.

The intention of this obligation was to give the bank of Scotland a security which they could trust to, for a credit they had agreed to grant to the said Ebenezer M'Culloh and George Young.

It proceeds upon the narrative, that the directors of the bank had agreed to afford to the said Ebenezer M'Culloh, and George Young junior, under the firm of Ebenezer M'Culloh and Company, a credit to the amount of L. 6000 Sterling, to be advanced to them upon bills, which the Governour and Company should discount to them under the following conditions: *imo*, That the value of the bills already discounted to the said Ebenezer M'Culloh and company, and of the bills accepted by them, and by the said Ebenezer M'Culloh, and George Young junior, which had been discounted to other persons preceeding the date of the obligation, and

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were not then paid, amounting to L. 3385 : 17 : 7 Sterling, should be imputed and held as advanced to the said Ebenezer M'Culloh and company, in part of the said L. 6000. *2do*, That the bills to be discounted to them should be payable in Edinburgh, and have no more than six callendar months to run. And, *3tio*, That as soon as any of the bills discounted, or to be discounted, shall be paid to the bank, the said Ebenezer M'Culloh and company should be at liberty again to make use of the said credit, by having other bills discounted in place of those paid, and so to proceed in like manner during the continuance of the said credit.

It likewise proceeds upon the further narrative, that the said credit was granted upon the condition of the said Patrick Earl of Dumfries, &c. their becoming bound in manner underwritten ; after which comes the obligatory clause, whereby the said Partrick Earl of Dumfries, &c. bound and obliged them conjunctly and severally, their heirs, executors, and successors whatsoever, That the said Ebenezer M'Culloh and company should retire all and whatsoever bills the said Governour and Company had, preceeding the date thereof, discounted to them, or which having been accepted by them, or by Ebenezer M'Culloh and George Young, the said Governour and Company had discounted to any other person or persons, amounting to the foresaid sum of L. 3385 : 17 : 7 Sterling, and should likewise retire all and whatsoever bills the said Governour and Company should thereafter, during the continuance of the said credit, discount to them the said Ebenezer M'Culloh and company, in the terms and upon the conditions therein written, and that punctually without any premonition, or intimation against the day or days upon which such bills should become payable, by making payment to the said Governour and Company, or to James Spence their treasurer, and his successors in office, in their name, and for their behoof, or to their assignees, of the sum specified in all and every one of the said bills, with the due and ordinary annualrent thereof, during the not payment of the principal sums, together also with a fifth part more of each of the said principal sums of liquidate expences in case of failure, or otherways, to make payment to the said Governour and Company

Company of the said L. 6000 or such part thereof as should be advanced upon bills already discounted, or to be discounted by them, &c. declaring, that the said Governour and Company should not be bound to do any manner of diligence upon the bills discounted, or to be discounted by them, but that it should be in their power, as they should judge most expedient, to do diligence either upon the said bills, or any of them, or upon the obligation granted by the said Patrick Earl of Dumfries, &c. or upon both, the one but prejudice of the other: And further declaring, that a state or accompt of the bills discounted, or to be discounted, drawn out, certified, and signed by the accountant of the bank, or in his absence by his assistant, should be sufficient by itself to ascertain and liquidate the sum, for which from time to time a charge of horning might be given against the said Patrick Earl of Dumfries, &c.

In consequence of this obligation, the bank of Scotland discounted a variety of bills to Ebenezer M'Culloh and Co. without ever taking under their consideration the circumstances or credit either of the drawers or accepters of such bills. Being perfectly secure by this obligation, by which, in the event of Ebenezer M'Culloh and company's not retiring the bills when due, the obligants were taken bound to pay the contents, it was of no moment to the bank what sort of bills were offered to them. They therefore readily discounted every bill which was brought to them by Ebenezer M'Culloh and company.

Amongst others, they discounted a bill upon the 11th of December 1769, drawn, upon the 4th of that month, by Ebenezer M'Culloh and company, upon, and accepted by William Hunter merchant in Dumfries, for L. 185 : 5 s. Sterling, payable one month after date. And this bill was, as usual, indorsed by the said Ebenezer M'Culloh and company, to James Spence treasurer of the bank of Scotland, or his successors in office, value received.

Ebenezer M'Culloh and company having stopped payment much about the time of this transaction, fundry arrestments were used in the hands of the said William Hunter; and, amongst others, an arrestment was used, upon the 15th of December 1769, at the instance

stance of the petitioners, as creditors to the said Ebenezer M'Culloh and company.

Upon the 6th of January 1770, the said bill was protested for non-payment; and soon thereafter Mr Hunter obtained a suspension, and brought a process of multiple-poinning, in which he called the said Ebenezer M'Culloh and company, James Spence the treasurer to the bank of Scotland, their indorsee, and the petitioners and the other arresting creditors, as defenders.

These processes having come before the Lord Monboddo Ordinary, were conjoined; and, upon the 30th of June last, his Lordship was pleased, in absence of the petitioners, "to allow Mr Hunter to retain the sum of L. 4: 18: 6 $\frac{1}{2}$, as the expence of the suspension and multiple-poinning, and to prefer the said James Spence to the remains of the sum in his hands."

The petitioners, upon a representation, were reponed against this decret of preference in absence, and were heard by their counsel; when they insisted, that, as the bank of Scotland did not discount the above bill upon the credit either of the drawers or acceptor, but solely upon the faith of the obligation of Lord Dumfries, &c. above recited, the bank could not be considered as having paid value for the said bill; and that, on that account, the petitioners ought to be preferred in consequence of their arrestment; or that at least the bank ought to assign the said obligation to the petitioners, to the extent of the sum due upon the bill. And minutes of debate having been made up, the Lord Ordinary was pleased, upon the 11th of August last, to pronounce the following interlocutor: "The Lord Ordinary having considered the above debate, finds, That Mr Spence, the indorsee, is preferable for the value of the accepted bill by William Hunter; and that the bank of Scotland, for whom Mr Spence acts, is not obliged to assign the security which they have for the bills of M'Culloh and company which they should discount; and declares, superseding extract to the third federunt day of November next."

The petitioners upon this preferred a representation; and answers having been put in thereto, in the name of James Spence, treasurer

rer to the bank of Scotland, the Lord Ordinary was pleased, upon the 18th of January last, to pronounce another interlocutor in the following terms: " The Lord ordinary having considered this representation, with the answers, finds, That, in respect my Lord " Dumfries and others, by the obligation which they came under to " the bank of Scotland, are to be considered as cautioners, that the " bills discounted by the bank to Ebenezer M'Culloh and company " should be paid by the accepters, indorsers, or drawers, and, in " respect the bank insists for payment of the bill in question against " the acceptor, finds, That there is nothing in the transaction can " bar them from doing so; but that, on the contrary, the option " is reserved to them to do so, if they think proper; and that, having recovered their payment in that way, there is no debt due to " them by the cautioners which they can assign. Therefore refuses " the desire of the representation, and adheres to the former interlocutor."

The present question is not of very great importance to the petitioners in point of pecuniary interest; but as it may be of considerable consequence in point of precedent, they beg leave to submit the above interlocutors to your Lordships review.

The petitioners do readily admit, That a person, who, in the ordinary course of business, pays value for a bill upon the faith of the acceptor, is intitled to exclude the diligence of the drawer's creditors. The indorsation is considered as equivalent to an intimated assignation, and cannot therefore be affected by any arrestment in the hands of the acceptor, or by any plea of compensation that might be competent to him, had the bill continued in the hands of the drawer. This however is a deviation from the principles of the law of this country, and has only been introduced for the sake of commerce, which has occasioned many extraordinary privileges to be given to bills. But as the general law of a country ought never to be departed from, but in cases of evident necessity, or expediency; so these extraordinary privileges granted to bills ought never to be extended to cases where the reason introductory of them does not apply. The principle upon which it has been established, that bills

passing by indorstation, are neither affected by arrestment in the hands of the acceptor, nor liable to any exception arising from private transactions between the drawer and acceptor, is founded upon the following rules of expediency. 1st, That, being the ordinary vehicles of trade, they fall to be considered as bags of money, passing from hand to hand, which the acceptor must be ready to render effectual to the holder of the bill the moment it becomes due : And, 2^{dly}, That, as they are not intended for permanent securities, and, as they pass from hand to hand by the simplest of all modes of transference, it would be the greatest encouragement to fraud, if it were in the power of the acceptor to evade making payment to the holder of the bill, by any exceptions competent to him against the drawer, or in the power of the drawer's creditors to attach the contents of the bill by arrestments in the hands of the acceptor to the exclusion of the onerous indorsee, who, upon the bill being indorsed to him, paid the full value thereof to the drawer.

This notwithstanding, it would be attended with consequences equally dangerous, if the holders of bills were, in all cases, allowed to plead the effect of an indorstation to that extent. The law therefore justly allows an acceptor of a bill to prove, by the oath of the indorsee, or holder, that he did not pay real value for the indorstation, or that he holds the bill, either in trust for the drawer, or in security of a former debt : And these conditions of the indorstation being proved, every exception that would have been competent against the drawer, had the bill remained in his person, must be equally competent against the indorsee. Such indorsee cannot pretend that he purchased the bill in the way of trade, for present value. He therefore is not intitled to the extraordinary privileges introduced for the sake of commerce, and the security of traders, in favour of those who purchase bills for value truly advanced.

The same rules will likewise be observed, when a question occurs between an indorsee of this kind, and the creditors of the drawer, by whom the bill has been indorsed. If the indorstation was a fair transaction in the course of trade, and purchased for real value upon the faith of the acceptor's making payment of the bill

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when due, he will be perfectly secure: But, if upon the other hand, the bill was indorsed to him, not in the ordinary way of trade, for value instantly paid, but in trust, or in security of a former debt, the creditors of the drawer will be at liberty to attach the debt, by the diligence of the law, and, by using arrestments in the hands of the acceptor, will create a legal preference to themselves, to the exclusion of the indorsee.

These points are *triti juris* ; it is therefore only necessary to enquire how they are applicable to the present case.

The petitioners admit, that the bank of Scotland did pay to Ebenezer M'Culloh and company value for the bill in question, when it was indorsed to their treasurer, for their behoof; but they contend that circumstances attended this transaction sufficient to take the present case out of the principles of law and expediency upon which the extraordinary privileges of indorsation depend.

Circumstances of conveniency, views of profit, or motives of caution, induced the governour and company of the bank of Scotland, some time ago, to limit their former mode of giving credit in the way of cash-accounts, and to substitute in its place a mode of issuing money, by discounting good bills of short dates; and, by doing so, they prevented the credits which they gave from being used as dead loans, having it alwise in their power to force payment of the bills they discounted, how soon they became due; and, by proceeding in a regular way, they might have it in their power to command their funds more easily, and, indeed, be able to give assistance in the way of credit, to many more persons than they could formerly do, when their funds, drawn out from them by the holders of cash-accounts, were not so much under their own power. It is accordingly well known, that, for some time past, the bank of Scotland have given few if, any new credits upon cash-accounts; and that the most, if not all which they had formerly granted in that way, have been restricted to the trifling sum of L. 500.

It is surely needless to observe, that, when the bank of Scotland took up this mode of carrying on their business, they would in every
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case be most attentive to the credit and circumstances, not only of the drawers of bills, but likewise of the accepters; and, when they discounted a bill upon the faith of its being a good bill, they became, no doubt, onerous indorsees, in the truest sense of the word, and were of course intitled to every privilege conferred by law upon such indorsees. But, it is plain, that the bills which they discounted to Ebenezer M'Culloh and company were by no means discounted in the ordinary way of their doing business, upon the faith of the drawer or acceptor. On the contrary, a new and unusual mode was introduced, by which a number of persons of undoubted credit were taken bound, alongst with Ebenezer M'Culloh and his partner, that the said Ebenezer M'Culloh and company should regularly retire whatever bills the banks should discount to them, during the continuance of the credit allowed them, to the extent of L. 6000 Sterl. and that, in the event of that company's neglecting to retire the bills when due, the granters of the obligation given to the bank should be conjunctly and severally liable in the contents of such bills.

Such being the nature of the obligation, it will be obvious to your Lordships, that the bank of Scotland, when they discounted the bill in question, upon the very eve of the bankruptcy of Ebenezer M'Culloh and company, did not take under their consideration the credit or sufficiency either of the drawers or the acceptor, and indeed could not possibly be influenced by any such consideration; for as, upon receiving the obligation from the Earl of Dumfries and his co-obligants, they agreed to grant a credit to Ebenezer M'Culloh and company, to the amount of L. 6000 Sterling, to be advanced upon bills to be discounted at the bank, they were thereby bound to discount any bills which the said Ebenezer M'Culloh and company should present to them to that extent, provided such bills were payable in Edinburgh, and had no more than six callender months to run. This being the case, it is humbly submitted to your Lordships, that the bank do not fall properly to be considered as onerous indorsees of this bill, or as having paid value for it. It was the obligation above recited that alone induced them to advance money to Ebenezer M'Culloh and company; and, although it was agreed, that such advances

vances should be made, in the way of discounting bills from time to time, that circumstance can make no variation; that part of the agreement did not proceed from the bank's desiring the additional security of the drawers or accepters of such bills, but was intirely owing to the method in which the bank at that time thought proper to conduct their business. They had then laid aside the plan of giving credits in the way of cash-accounts, at least to so great an extent as L. 6000, and had even restricted those credits they had granted in that way to a very inconsiderable sum. This being the case, they had no other way of supplying Ebenezer M'Culloh and company with money from time to time, but by discounting bills; and they accordingly agreed to discount any bills which that company should offer to them, and took the Earl of Dumfries and his co-obligants bound, not that these bills should be paid by the accepters, but that they should be retired by the said Ebenezer M'Culloh and company. It is plain therefore, that in effect this method of supplying Ebenezer M'Culloh and company with cash, was, *quoad* the security of the bank, the same as if they had granted them a cash-account to the extent of L. 6000, upon receiving the joint security of the persons who concur in the obligation above recited.

It was indeed pleaded in the name of the treasurer to the bank, that it appeared that the bank was by no means indifferent, with regard to the bills which were to be offered for discount, in respect that, by the very obligation granted by Lord Dumfries and his co-obligants, it was made an express condition, that such bills should be payable in Edinburgh, and should not have more than six calendar months to run.

But these circumstances can have no influence. The bank of Scotland conduct their business in a different way from other banking companies, more lately erected in this country. They have not adopted the plan of employing agents in different towns through Scotland. They have hitherto been able to carry on their operations without putting themselves to that expence. They did therefore, in consistency with that plan, lay it down as a fundamental part

of the agreement, that they were to discount no bills but such as were payable in Edinburgh. Such bills they could regularly protest themselves, if not taken up when they fell due; but, if they had discounted bills payable at Glasgow, Dumfries, Aberdeen, and the other towns in Scotland, they must have been under the necessity of employing persons in all these different places to do the needful upon them. This circumstance, therefore, does not in the least impinge upon the position laid down by the petitioners, that, *quoad* their own security, the bank were perfectly indifferent what bills should be offered them for discount by Ebenezer M'Culloh and company.

The stipulation that the bills to be discounted should not have more than six callendar months to run, is to be accounted for with equal ease. The ordinary rule observed by the bank of Scotland is, to discount no bills that have more than 60 days to run. In this they follow the practice of the bank of England; and their motives are, to turn their money often, to make their issues and receipts as regular as possible, to put the credits they give out of the stile of dead loans as much as they can, and to have the proper command of their funds at all times. This rule was not, however, it seems, addapted to the situation of Ebenezer M'Culloh and company; and, as a new mode of assisting them with credit was to be introduced, the bank agreed to depart from their ordinary practice, and to discount bills to them, even though they were not payable till six months thereafter. But they, at the same time, would not agree to discount bills of a longer date; not because such bills might be more dangerous, but because they did not chuse to allow Ebenezer M'Culloh and company to make use of the credit that the bank was to give them, as a dead loan, which they might not be intitled to demand for a long time; and because, by the rules which they followed in granting cash-accompts, it was alwise made a condition, that such accompts should be balanced at the period of each six months at farthest; and that, in case the directors should at any time after the expiry of six months from the date of the bonds of credit,

credit, judge it necessary to do so, they might proceed in legal diligence upon such bonds. It is therefore equally obvious, that this circumstance does as little impinge upon the petitioners position, that the bank trusted entirely to the separate obligation; and that it was a matter of perfect indifference to them, what were the credit and circumstances either of the drawers or accepters of the bills offered for discount. And it is a certain fact, that, upon the faith of this obligation, the bank discounted many bills to Ebenezer M'Culloch and company, upon the security of which, without that obligation, they would not have advanced a single sixpence.

Such being the nature of the credit given to Ebenezer M'Culloch and company, the petitioners do, with submission, apprehend, that the bank of Scotland cannot, in this case, be said to have paid value for the bill in question, or be considered as onerous indorsees, so as to exclude the diligence of the drawer's creditors; because the principles upon which the privilege is conferred upon real onerous indorsees, from motives of expediency and security in mercantile transactions, in opposition to the genius of the common law of this country, do not apply. The money advanced by the bank, when they discounted this bill, was in effect value paid, not for the bill itself, but for the obligation granted by Lord Dumfries, and his co-obligants. The indorsation of this bill, in favour of the bank, ought therefore, at best, to be considered only as an indorsation in security; and, on that account, ought not to intitle the bank to compete with the petitioners arrestments in the hands of the acceptor.

Nor is it of any consequence that, by the said obligation, it was made optional to the bank, either to resort to that security, or to do diligence upon the bills to be discounted by them. The simple indorsation to their treasurer, gave them a right to use diligence upon the bills indorsed, without inquiring whether they were onerous indorsees or not; but it will not from thence follow, that such indorsation must of itself be sufficient to exclude the diligence of other creditors, who are able to show that the bank does not fall properly to be considered as onerous indorsees, in the sense in which the law

law has considered an indorsation as equal to an assignation duly intimated. The bank may no doubt use diligence upon the bill, which, by the indorsation in their favour, has come into their person; but still it will be competent to the petitioners to plead, that such diligence cannot compete with their prior arrestments.

It was indeed maintained, in the name of the bank, though in reality in the behalf of the Earl of Dumfries and his co obligants, at whose expence and by whose lawyer and agent the cause has all along been conducted, that as the acceptor of a bill is undoubtedly liable to the holder in payment; so, upon the acceptor's making payment, the whole indorsers are thereby relieved. That the Earl of Dumfries and his co-obligants are here in the same situation as if they had indorsed the bill; for, though they were taken bound that Ebenezer M'Culloh and company should retire these bills, yet that was only in the event of the acceptor's not making payment: That, as the obligation had no effect without bills being indorsed; so it became void when those bills were paid: That the gentlemen bound in that obligation can therefore be considered in no other view than as securities for the acceptor and indorsers: That, of consequence, as Mr Hunter, the acceptor, was able and willing to pay his bill, the petitioners arrestment can be no bar to such payment: And that, as the bank might insist upon Lord Dumfries and the other obligants retiring all the bills discounted under that security; so, upon the other hand, these obligants had a good title, upon making payment, to insist for an assignment from the bank to the whole bills which they might so retire.

The petitioners do, however, apprehend, that this argument cannot avail their competitors. There is no foundation in the bond granted by Lord Dumfries and the other gentlemen for alledging that they thereby became cautioners for the acceptors of the bills that were indorsed by Ebenezer M'Culloh and company. The very reverse appears from the deed itself, by which it is expressly declared, that the bank should not be bound to do any manner of diligence upon those bills; and the only obligation they come under was, that Ebenezer M'Culloh and company should *retire them*. It is true indeed,

deed, that payment by the acceptor would sufficiently relieve them from that obligation, in the same manner that they would have been relieved by Ebenezer M'Culloh and company's retiring the bills themselves; but it is by no means a necessary consequence thereof, that they must be equally relieved, because in this case Mr Hunter is able and willing to pay his bill, seeing that a *medium impedimentum* has intervened to prevent him from so doing, *viz.* the arrestments used in his hands by the petitioners. The question therefore returns just to where it was; *viz.* Whether the bank, who advanced the amount of the contents of the bill, not on the faith of the acceptor, but merely upon the faith of the security granted by the Earl of Dumfries and his co-obligants, can legally be considered as onerous indorsees, in the proper sense of the word, so as to exclude the diligence of the law used by other creditors? and that they cannot be considered in that light, seems clear to the petitioners from what has already been said.

Nor is it to the purpose to plead, that the Noble Lord and the gentlemen who joined in the security to the bank could have insisted for an assignment to such of the bills as they had retired, in order to enable them to seek their relief from the accepters. For, in the first place, such assignment must have been burdened with every legal clog that would have attended the bills themselves, while the bank continued to hold these bills. Let it be supposed, that, instead of a claim being reared up in name of the bank for payment of the present bill from the acceptor, these obligants had paid the value to the bank, and taken an assignment to it, they would, no doubt, in that case have been intitled to demand payment from the acceptor; and, if the sum due by him had not been previously arrested, they would certainly have recovered such payment. But, as in fact that sum was attached by the petitioners arrestment, the assignment from the bank to the Earl of Dumfries and his co-obligants could not entitle them to compete with the petitioners, and could only procure them a preference, *secundo loco*, in the event of the sum owing by Mr Hunter not being exhausted by the debt due to the petitioners.

In the next place, your Lordships will attend to this material circumstance, that the obligants in the bond to the bank did not make it a condition of their engagement, that the discounted bills should remain a pledge for their relief, or be assigned by the bank to them upon their making payment of the contents of these bills; and therefore the petitioners do humbly apprehend, that, if these obligants had retired the bill in question, when it became due, which was not till sometime after the bankruptcy of Ebenezer M'Culloh and company, an assignment by the bank to that bill could not have enabled them to compete with the petitioners prior arrestment. At the time of the bankruptcy, these obligants were creditors to Ebenezer M'Culloh and company for the total amount of the bills discounted by the bank then unretired. This being the case, any deed of preference granted to them by Ebenezer M'Culloh and company, in order to enable them to operate their relief, would have been void and null; and if so, it seems to the petitioners to follow, as a necessary consequence, that, as no assignment to the bills was stipulated in the bond which these obligants granted to the bank, it could not be in the bank's power to do any thing towards relieving them, which Ebenezer M'Culloh and company could not do themselves. It would indeed be attended with dangerous consequences, if either a public company or a private person should have it in their power, by taking accumulated securities to do in the case of a bankruptcy what the law has expressly debarred the bankrupt from doing himself.

Let it be supposed that the bank had actually insisted for payment of the sums due upon the bills discounted to Ebenezer M'Culloh and company, from Lord Dumfries and his co-obligants, and that, upon receiving payment, the bank had assigned the whole of these bills to them, or to a trustee for their behoof, what would have been the consequence? It surely could not be maintained, in a competition with the petitioners by Lord Dumfries and his co-obligants, that they were cautioners for Mr Hunter the acceptor, and were therefore entitled to recover from him the money which they had paid to the bank on his account, notwithstanding the prior arrestment

ment used in his hands by the petitioners. It would be a sufficient answer to this plea, that from the obligation itself, it is evident, that they could not be considered as cautioners for the acceptor, (the tenor of that obligation being, not that the accepters should retire these discounted bills, but that they should be retired by Ebenezer M'Culloh and company), and that, on that account, they could only compete with the petitioners in the character of creditors to that company. But surely under that character they could have no title to exclude the petitioners' arrestments. They could be in no better situation than Ebenezer M'Culloh and company themselves. Every exception that would have been competent to the acceptor against Ebenezer M'Culloh and company, would have been competent against Lord Dumfries and his co-obligants, and of course the petitioners who had attached the sum due by the acceptor in consequence of their arrestments prior to the possibility of an assignment from the bank, would fall to be preferred. Both the petitioners and the obligants in the discount bond would necessarily be considered as creditors to Ebenezer M'Culloh and company, and of consequence the effect of the diligence used by them, and not the assignment by the bank, would fall to determine their preference over each other. The obligants in the discount-bond could only plead as cautioners for Ebenezer M'Culloh and company, and could by no means be considered in the same light as third parties, who might truly and fairly have acquired every right that was in the bank; and, as it would not have been in the power of M'Culloh and company, within 60 days of their bankruptcy, to have made any conveyance that could have been effectual for the relief of their cautioners to the bank, much less could it be in the power of the bank to do any act that would be equivalent.

The petitioners do therefore humbly submit it to your Lordships, that, in the particular circumstances of this case, the bank of Scotland cannot compete with them, but must betake themselves to their separate security, which is fully sufficient to answer their demand, though it were a hundred times the sum presently in dispute; but, even supposing it still competent to the bank, notwithstanding

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ing the arrestment used by the petitioners, to make their election either to come upon the acceptor of the bill in question, or to resort to their separate security, it is humbly thought, that, in the event of their taking Mr Hunter the acceptor for their paymaster, they must assign that separate security to the petitioners to the extent of the sum in dispute.

It is an established principle in the law of this country, that a creditor, who has two securities in his person, when he takes his payment out of one of these securities, must assign the other to the rest of the creditors, in order that they may operate their relief. And many decisions to that effect are to be found in the Dictionary *voce* Debitor and Creditor. This rule is indeed founded upon the most equitable and rational principles, which forbid that it should be in the power of any one creditor to prevent another creditor from getting payment when he has it in his power, without doing so, to secure himself effectually. In the present case, the bank of Scotland and the petitioners have each of them an interest in the sum in question due upon Mr Hunter's bill, the one by the indorsation, and the other by their arrestment; but the bank has another security much more than sufficient to answer their demand, viz. the obligation granted by Lord Dumfries, &c.; and therefore, as by insisting against the acceptor of the bill in right of the indorsation in their favour, instead of demanding payment out of the separate security, to which alone they trusted, they endeavour to prevent the petitioners from getting payment out of the subject attached by them, they ought undoubtedly to assign to the petitioners that separate security, seeing that, if they were not to insist against the acceptor, but to betake themselves to the Earl of Dumfries and his co-obligants, the petitioners would recover the money in Mr Hunter's hands, in consequence of their arrestment.

Questions of this kind are sometimes illustrated by putting analogous cases. Let it be supposed, that Mr Hunter had granted his acceptance to Ebenezer M'Culloh and company, without receiving any value, and merely with a view to assist their credit upon their granting to him an obligation to retire it themselves when it should become

become due, that, upon their failing to do so, the bank had proceeded to use diligence, and that Mr Hunter had suspended their charge, upon the following grounds: 1st, That he had received no value for his acceptance; and, 2^{dly}, That as the bank, when they discounted the bill, did not trust to his credit, to which they were intire strangers, but trusted solely to the faith and credit of Ebenezer M'Culloh and company, and the Earl of Dumfries and his co-obligants; therefore he ought either to be totally liberated from payment, or obtain a conveyance from the bank to the separate obligation granted to them, in so far as respected that particular debt. It is humbly thought that, in that case, the bank would have been obliged to grant such conveyance, and that the Earl of Dumfries and his co-obligants would, in consequence thereof, have been bound to relieve Mr Hunter.

Again, let it be supposed that Mr Hunter, who actually got value for the bill in question, had become bankrupt, and that the bank, in consequence of diligence used in their name, were insisting to draw a proportion of his effects, would not his other creditors be intitled to demand an assignment from the bank, to the obligation granted by the Earl of Dumfries, and his co-obligants, in so far as the bank should draw payment out of these effects? it is humbly thought that this could not be refused, and that the bank could not make their option, of having recourse upon Mr Hunter's funds, to the prejudice of his other creditors, when they had another security to trust to, without giving these other creditors the benefit of that other security.

The petitioners case is, however, nearly similar. As creditors to Ebenezer M'Culloh and company, who are now bankrupt, they have attached a debt due to that company by Mr Hunter; and as they would be intitled to demand from every prior arrester, an assignment to any separate security which such prior arresters might have obtained from Ebenezer M'Culloh and company, they must be equally intitled to make the same demand against the indorsees of Ebenezer M'Culloh and company; who, in consequence of an indorsation for value, are endeavouring to exclude the effect of their arrestment; although therefore the bank, in this case, should be preferred as onerous indorsees; yet, as thereby the preference of the petitioners arrestment will be defeated, the bank,

before obtaining a decret against Mr Hunter, ought to convey to the petitioners the collateral security which they obtained from the Earl of Dumfries, and his co-obligants, who, if they had paid the money, and had obtained an assignment from the bank, could not have competed with the petitioners any more than M'Culloh and company could themselves have done, in respect that they could claim only as cautioners for that company.

It is needless, however, to detain your Lordships longer upon this branch of the argument, as the petitioners are hopeful you will be satisfied, that they are well founded, in the first plea maintained by them, viz. that the bank of Scotland cannot compete with them, in respect that they did not purchase the bill in question, in the common and ordinary way of trade, trusting to the drawers or acceptor; and that it was only indorsed to them as a *medium* upon which, according to their plan of management, they could alone advance the money to M'Culloh and company, for which they had given them a credit, upon receiving a security from Lord Dumfries and the other persons joined with him. Had M'Culloh and company retired this bill themselves, by making payment of its contents to the bank, when it became due, the petitioners arrestment would undoubtedly have carried the sum due by Mr Hunter upon that bill, to the exclusion of M'Culloh and company; and as, in the event of M'Culloh and company's neglecting to retire it, Lord Dumfries and his co-obligants became bound to pay to the bank the money advanced by them, when it was indorsed to their treasurer, the petitioners must, in the like manner, carry the sum due by Mr Hunter, in consequence of their arrestment, to the exclusion of these co-obligants, who neglected to use the like diligence in due time for their own relief.

May it therefore please your Lordships, to alter the Lord Ordinary's interlocutors; to find, That Mr Spence cannot compete with the petitioners, and that they fall to be preferred to the sum due by Mr Hunter; or at least to find, that the governor and company of the bank of Scotland are obliged to assign to the petitioners the security granted by the Earl of Dumfries, and his co-obligants, to the extent of that sum.

According to justice, &c.

ALEX. WIGHT.